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HIGGS, FLETCHER & MACK, LLP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BROOKMEAD PARTNERS, LP, a Nevada limited partnership, Plaintiff, v. Interinsurance Exchange Of The Automobile Club, a California business entity, Saracia L.P. Shannahan, and William P. Shannahan, Higgs, Fletcher & Mack, a California business entity, Defendants.	Case No. 08 CV 659 JLS (WMc) **DECLARATION OF MICHAEL GIBSON IN OPPOSITION TO EX PARTE APPLICATION FOR EMERGENCY RELIEF FROM ORDER DATED JUNE 11, 2008** Before the Honorable: United States District Judge Janis L. Sammartino
HIGGS, FLETCHER & MACK, LLP, Cross-Complainant, v. BROOKMEAD PARTNERS, LP, a Nevada limited partnership, SARACIA L.P. SHANNAHAN, and DOES 1-50, inclusive Cross-Defendants.	

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I, MICHAEL R. GIBSON, declare as follows:

A. Introduction and Summary of this Declaration.

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I am an associate with the law firm of Defendant and Cross-Complainant HIGGS, FLETCHER & MACK, LLP ("HF&M"), which is representing itself in the above-captioned matter. The matters set forth herein are based upon my own personal knowledge, except those expressly stated upon information and belief, which I believe to be true.

2. The purpose of this declaration is twofold: to clarify the circumstances under which HF&M filed its cross-complaint for interpleader; and to authenticate and attach a copy of the transcript of the May 6, 2008 hearing before Judge Ashworth in the state court family law matter.

B. The Circumstances of HF&M's Interpleader Action.

3. In the matter of *In re the Marriage of Shannahan,* on or about April 11, 2008, the Superior Court for the State of California, County of San Diego, through Honorable Thomas Ashworth, III (Ret.), issued an order directing as follows:

> "The proceeds of the check from Interinsurance Exchange of the Automobile Club check #5582308 or any replacement check in the amount of $957,525.23 shall be deposited into an interest-bearing segregated client trust account of Higgs, Fletcher & Mack, LLP, on or before close of business April 11, 2008. In the event that the proceeds are not so deposited by that date, then they shall be deposited to an interest-bearing segregated client trust account with the Law Offices of Beatrice L. Snider, APC."

4. On May 27, 2008, AAA issued a check in the amount of $957,525.23 (the "Payment") made payable to HF&M. Consistent with Judge Ashworth's Order, HF&M deposited the funds into a segregated, interest-bearing client trust account where they remain today.

5. On or about April 11, 2008, Plaintiff and Cross-Defendant Brookmead Partners, LP ("Brookmead") filed a complaint commencing this action. Thereafter, on or about May 29, 2008, Brookmead filed a first amended complaint which added HF&M as a defendant. Brookmead's operative complaint arises out of its claim to the Payment. In addition to HF&M, Brookmead named Saracia L.P. Shannahan as a defendant and outlined her competing claim to the Payment.

6. In response to Brookmead's complaint, and in light of the fact that HF&M is not making a claim for the Payment, HF&M filed an answer to Brookmead's complaint and concurrently filed a cross-complaint in interpleader on or about May 29, 2008, naming Brookmead and Mrs. Shannahan as cross-defendants based upon their competing claims for the Payment. Attached to the cross-complaint was a copy of Judge Ashworth's Order.

7. Prior to filing the cross-complaint, I instructed my staff to contact the clerk for Judge Janis L. Sammartino and the business office of the United States District Court, Southern District of California, in order to determine the most efficient procedure by which HF&M could deposit the Payment with the Court. During those discussions, we were advised to file the cross-complaint in normal course and to e-mail a draft order permitting HF&M to deposit the Payment to Judge Sammartino's chambers directly. At that time, I expected the draft order would not be approved before the parties had an opportunity to respond to HF&M's cross-complaint, and to brief the Court on the facts and circumstances surrounding the Payment and competing claims for same. Consistent with the Court's directive, HF&M filed its cross-complaint and e-mailed a draft order to Judge Sammartino's chambers.

8. After filing the firm's cross-complaint, I contacted Davry Mack Cohan, counsel for Brookmead, in order to ascertain the most efficient means of effecting service of the cross-complaint upon Mrs. Shannahan. During those discussions, Mr. Cohan advised that Mrs. Shannahan was evading service, but that Jill Sullivan of Chapin Wheeler, LLP, would represent Mrs. Shannahan in this action. Accordingly, on June 11,

2008, I wrote to Ms. Sullivan and respectfully requested that she agree to accept service of HF&M's cross-complaint.

9. By coincidence, on the same day I sent my letter to Ms. Sullivan, the Court issued its Order permitting HF&M to deposit the Payment with the Court. While I was surprised that the order had issued, it did not cause me any particular alarm, as I already knew from discussions with my partner, attorney John Morris, that he did not intend to actually *deposit* the insurance proceeds in the federal court action until it was finally resolved in the state court divorce action whether Judge Ashworth intended to exercise continuing jurisdiction over those funds.

C. **Authentication of Attached Exhibit**

10. Attached to this declaration is a true and correct copy of the entire transcript of the hearing before Judge Ashworth on May 6, 2008. This is submitted for the general purpose of showing: (a) that Judge Ashworth was well aware of this federal declaratory relief action; and (b) that Judge Ashworth was of the initial opinion that the state court probably would not have jurisdiction over the insurance proceeds once he entered Judgment in the state court action, and that, in any event, *this Court*, having supremacy over the state court, was the probably the proper forum in which to resolve this dispute.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 8th day of July 2008, at San Diego, California.

MICHAEL R. GIBSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

In re the Marriage of:

Petitioner: SARACIA SHANNAHAN

and CASE NO: D 483710

Respondent: WILLIAM PAUL SHANNAHAN

______________________________/

JAMS HEARING

Taken at San Diego, California

May 6, 2008

Reported by Dana E. Simon - CSR
Certificate No. 12683

I N D E X

JAMS HEARING
MAY 6, 2008

INDEX OF EXHIBITS

(None offered)

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On Tuesday, May 6, 2008, commencing at the hour of 10:40 a.m., at 401 B Street, Suite 2100, in the City of San Diego, County of San Diego, State of California, before me, Dana E. Simon, Certified Shorthand Reporter in and for the State of California, the following hearing was then conducted:

A P P E A R A N C E S

HONORARY THOMAS ASHWORTH III (Ret.) JAMS

FOR THE PETITIONER:

LAW OFFICES OF BEATRICE L. SNIDER
BY: WIN HEISKALA, ESQ.
9663 Tierra Grande, Suite 301
San Diego, California 92126
(619) 566-6650

FOR THE RESPONDENT:

SANDLER, LASRY, LAUBE, BYER & VALDEZ:
BY: EDWARD I. SILVERMAN, ESQ.
(Specially appearing for John Morris and Darvy Mack Cohan)
402 West Broadway, Suite 1700
San Diego, California 92101
(619) 235-5655

FOR INTERINSURANCE EXCHANGE OF THE AAA:

SMITH, SMITH & FEELEY, LP
BY: STEPHEN E. SMITH, ESQ.
2601 Main Street, Suite 580
Irvine, California 92614
(949) 263-5920

SAN DIEGO, CALIFORNIA; MAY 6, 2008; 10:40 A.M.

THE COURT: We're going to go on the record now. This is the marriage of the Petitioner Saracia Shannahan and the Respondent William Paul Shannahan, and the case number is D 483710. And I'm going to ask for appearances, since we also have appearances from AAA Insurance Company, as I understand it.

And let me start with the Petitioner side of the case.

MR. HEISKALA: Your Honor, Win Heiskala, on behalf of Saracia Shannahan, who is also present.

MS. O'NEILL: Alexandra O'Neill on behalf of Saracia Shannahan, who is present.

THE COURT: All right. Thank you. Now we'll start with Mr. Shannahan's side of the case.

MR. SILVERMAN: Edward Silverman, appearing specially for John Morris and Darvy Mach Cohan, who represent Mr. Shannahan and Virginia Way, LP, respectively.

THE COURT: All right. Thank you.

MR. SMITH: And Stephen Smith for Interinsurance Exchange of the Automobile Club, AAA, if you will. And this is Mr. Polson, P-o-l-s-o-n, of

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Interinsurance Exchange, who is the claim adjustor on the file.

THE COURT: All right. Thank you. We did have some discussions off the record, some fairly extensive discussions. And, first, I would like to deal with my understanding of the issues involving the insurance company, and then we're going to get to the issues that are directly between the parties that deal with such things as a motion for a new trial and a motion to essentially enter a different judgment, if I can call it that, since we don't have a judgment entered at this point.

And so let me start with the insurance company. My understanding of what we discussed off the record was the insurance company wanted some direction as to what should be done with funds that they are -- have either already paid out, anticipate paying out, or have offered, but then have -- for one reason or another, payment has been stopped on them.

And we have a motion pending to join the insurance company, and we also have a case involving -- I believe that involves potentially the insurance company that has now been filed in federal court.

To start out with, I agree with Mr. Shannahan's position, and probably the insurance company, that in the motion to join the insurance company, there was not proper notice of that motion. And so any hearing on that, I would be continuing for a sufficient time for a response.

However, in my view, we have a resolution that I believe is acceptable to the insurance company that will make a joinder unnecessary, number one, and, number two, I would be disinclined to join the insurance company until I know what is going to happen in federal court in any event. In other words, if they're going to take over this aspect of the case, there's no reason to join the insurance company.

But more importantly from my standpoint, I don't think there's any reason to join the insurance company, anyway, as long as there is some control over the insurance funds. Now, my understanding of what we agreed to is that there are three different forms of payment that are pending now. There may be some subcategories. But one payment is for something in the range of $900,000.

MR. SMITH: If I might, $957,525.23.

THE COURT: All right. Thank you. That payment has been proffered, but we've had difficulty how it ought to be payable and where it is going. And included within that number is $44,000, or thereabouts, that is intended to clean up the debris on this property. And the balance of it relates to replacement of the structure, as I understand it.

Now, I previously ordered that that check be payable to both parties and deposited into a separate interest-bearing trust account, meaning not in an unsegregated client trust account, where the funds would go -- or the interest would go to the state. But I wanted segregated so the interest would go to the parties once it's deposited.

And I had originally ordered that that would go to Higgs, Fletcher & Mack. I'm modified that order in these respects: Number one, I'm ordering that the check be payable to the Higgs, Fletcher & Mack. And should the wording be segregated trust account or trust account for the benefit of the parties? Let's discuss the wording exactly.

MR. SILVERMAN: Since I brought it up earlier, my concern was that the Court was just talking about the Higgs, Fletcher trust account. And that is the one we would not want.

THE COURT: Correct.

MR. HEISKALA: It was put in trust for it, that one.

MR. SILVERMAN: I understand the Court's

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concept and whatever language the Court is comfortable with.

MR. SMITH: And I think, you know, if it's made payable to Higgs, Fletcher & Mack, and the memo says, you know, "in trust for," and there's a cover letter that will send that says this is -- they're officers of the court. They're going to do the right thing with it. I'm not worried about that.

THE COURT: All right. Fine. Then that is how I would like to have that money paid. If for any reason -- and I'm saying this because Mr. Shannahan's attorney has indicated that he did not want the funds, as I understand it, payable into this trust account. If that continues to be his position, then it is going to be paid into the trust account of Ms. Shannahan's attorneys.

And so we would need to know, Mr. Silverman, whether it is okay for them to make the payment that way or whether Mr. Morris, as Mr. Shannahan's attorney has been told, that he cannot do that. So that needs to be communicated to the insurance company and to Ms. Heiskala.

MR. SILVERMAN: I'll be meeting with Mr. Morris tomorrow. And if he can get back to Ms. Heiskala after that --

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THE COURT: Fine.

MR. SILVERMAN: Tomorrow is Wednesday. I don't know if Mr. Shannahan's in town. Maybe by Monday.

THE COURT: Okay. That's fine.

MR. SILVERMAN: By Monday, Mr. Morris will get in touch with Ms. Heiskala.

THE COURT: Okay. Now, I do not intend that this requires any separate order. This is either one or the other in the first choice, because it's the way I made the order originally is the Higgs Fletcher account.

MR. SMITH: May I make a suggestion? How about if we -- maybe if the Court could rule something to the effect that if we don't have, you know, authorization from Mr. Morris by next Friday, which would be -- I don't know what date that is -- the 16th, if we don't have an agreement that the check is going to be payable to Higgs, Fletcher & Mack and deposited, then we'll go through --

THE COURT: I'm just going to change that slightly, and I think that should be by Wednesday. I just don't want these founds out. So that's the 14th.

MR. SMITH: Okay.

THE COURT: Rather than waiting to the end of --

MR. SMITH: Okay.

MR. HEISKALA: So I think that's a better plan. You're to be noticed. Not me, right?

MR. SMITH: Yes. If they don't give me authorization by the 14th that the check can be made payable to Higgs, Fletcher & Mack and that they are going to actually deposit it -- because I don't want to go through the exercise of issuing a check and then having it just sit there and --

MR. HEISKALA: Right.

THE COURT: Absolutely. Okay. That's a good suggestion. And that's what's ordered.

MR. SILVERMAN: Let me just clarify that John is to get in touch with Mr. Smith by Wednesday the 14th that Higgs Fletcher will accept and deposit the check under the terms of the Court just stated, or else the insurer will issue the check to Ms. Heiskala's office.

THE COURT: Correct.

MR. HEISKALA: Close of business by the 14th?

MR. SMITH: Sure. Sure.

THE COURT: Now, next statement, there are also funds that are anticipated to be paid out relating to personal property residence contents that were destroyed. And anything paid in that regard is to be deposited into the same account. Also, the insurance company has already provided Ms. Shannahan with

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photographs and an inventory of those items that were destroyed. And in addition to that, the insurance company has restored certain items.

Ms. Shannahan does not have the inventory of those items, but the insurance company has graciously agreed to provide her with the information that they have of which items were destroyed. Mr. Shannahan may continue to keep those items in his possession where they presently are, pending further court order, because we haven't divided up the personal property, which is not a concern of the insurance companies.

MR. SILVERMAN: Could I ask the Court to request the insurer to also make available to Mr. Shannahan a copy of whatever he sends to Ms. Shannahan?

MR. SMITH: No problem.

THE COURT: Yes. That's reasonable. The only reason I didn't do that initially is he has the items, and he can see what they are. But I agree that it's a good idea in case there's a debate later on regarding something. They can work off the same document.

MR. SILVERMAN: Correct. And also for the record, I'd like to object that dealing with the personal property issue and the insurance proceeds wasn't noticed. And I am at a loss as to what

Mr. Shannahan's position would be.

THE COURT: I'm going to do it, anyway, because I'm trying to avoid joining the insurance company down the line. There's going to be -- when I'm finished with it, there's no reason to join them at all.

MR. SILVERMAN: I appreciate the explanation.

THE COURT: And that's why I'm doing this. And I do have that motion before me, although there's a question about the adequacy of the service. So I think it gives me some power in that area.

The final payment is that they're presently paying $8,000 a month to Mr. Shannahan for him to have substitute housing. And as I understand it, that's for a period of a year. They've already paid five months of it or so, something like that. So that there -- but the understanding is, and what I'm ordering is that that would continue to be paid to Mr. Shannahan on a monthly basis, and that he is entitled to receive those monies in order to provide for his housing since his home has been largely destroyed, other than the fact that there may be a homeless person living there.

Now, the reason that I've asked that this be paid on a monthly basis is because at the present time, Ms. Shannahan has housing in Virginia Way, which is something I found to be another item of community

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property for these parties. And as long as she's provided with that lodging, then I think it's reasonable that Mr. Shannahan would also have a place to live.

What would be a change of circumstances which would justify a modification of that order, which wouldn't affect the insurance company, other than where the money perhaps is paid, would be if the federal court action acts as sort of an unlawful detainer that removes Ms. Shannahan from Virginia Way at some point, while this money is still being paid out to provide for Mr. Shannahan's housing.

Under those circumstances, I might well require that Mr. Shannahan pay a portion of that to Ms. Shannahan since she's the one that would also need housing then. Right now, he is paying presumably Virginia Way LP for whatever the lease arrangements are in order to allow Ms. Shannahan to remain in Virginia Way. And under those circumstances, I think he's entitled to the $8000 a month for his housing.

Now, as far as I am concerned, I am willing to continue the joinder of the insurance company in that related motion to sometime in the future, because I don't think that a joinder is necessary here. There's no -- nothing that we need to do involving the insurance company. I think that's an imposition on the insurance company. And I must say that they've been the most cooperative party that we've had in this litigation and are remarkably flexible.

And I will -- if I didn't already have USAA, I would end up with AAA. So that's where we are on that.

Now, as far as I am concerned, the insurance company may, but is not required to, remain around for the remainder of these proceedings. The only question that I have -- would you prefer, Ms. Heiskala, that we reset this if it becomes relevant, or would you prefer that we fix sort of an arbitrary date so we have it here? There's some things that need to happen before I can act on it. I'm not going to interfere -- obviously, even if I had the power, I wouldn't try to interfere with the federal proceeding.

But more importantly, there is still a supremacy clause. And I think I have to acknowledge that. And if they decided to take over this aspect of the case, I've lost, I think, jurisdiction to do anything there. And so I want to give them that opportunity.

But more importantly, there's no reason to involve the insurance company, because everything that we wanted accomplished is already accomplished with their consent, which is certainly appreciated.

And so what I would like to know at this point, though, before we go any further is: Is there anything that I have said that is objectionable from the insurance company's standpoint at this time? Or to put it a different way, are you willing to voluntarily comply since I don't have you joined with these terms that are orders really between these two parties at this point, is my question.

MR. SMITH: I'm a company man, so I'm going to do what you say. There's no objection, honestly. The insurance company all the way along just wants to get rid of the money. And, you know, my preference on the loss of use would have just been to pay out the entire chunk. But I understand we're going to do it on a month-by-month basis. And we're perfectly willing to comply with all the orders that you're making, or have made, I guess I should say.

MR. POLSON: With regards to that, should we make the payment by a certain date at each month? So for instance, the 25th of each month, if we don't hear one way or the other, go ahead and issue payment? Is there any -- is that all right?

MR. HEISKALA: That's fine with me.

MR. SILVERMAN: If I can ask the company how they've been making the payments to Ms. Shannahan so far?

MR. SMITH: Originally, there was a three-month advance. And then after that, I think it was after we discovered there was this issue. I think it's pretty month been a month-to-month thereafter. Usually about, you know, the third week of the month or the next month.

THE COURT: Well, it is my intention that that just continue the way you have been doing it. Except now, it's -- since you went over to paying on a monthly basis, that it would continue in the same time frame. I'm not intending to alter that.

MR. SILVERMAN: That would be Mr. Shannahan's request.

MR. SMITH: Right. We'll keep doing that until we get some notice that there's a change in the Court's order.

THE COURT: All right. And if we pick a new date -- I won't make you wait around for that -- but if we pick a new date, I will ask that Ms. Heiskala at least inform you as to what it is.

MR. SMITH: Perfect. Fine.

THE COURT: But for right now, I don't see any purpose in it, really. So whether we set it without date at the moment or we pick an actual date so it doesn't look like it's drifted off somewhere, which

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would be arbitrary, and then probably would have to be changed, depending on how events evolve.

And I'm not asking -- because I don't think it's fair, Mr. Silverman, to ask you to agree to any of this. Because it really -- your client isn't here. And I don't think you have authority one way or the other on it. Although, you've certainly looked out after your client's interests. But I don't think it would be reasonable to ask you to agree to it, and I don't think you have that authority.

MR. SILVERMAN: And I appreciate it. We did object to the notice, and a continuance is certainly a response the Court can order.

THE COURT: Yeah. And I would like to know from a due process standpoint, though, what would you consider a reasonable time? I don't care what it is. Because as I've said, I don't see us having to act on that, in any event.

MR. SILVERMAN: The {inaudible} days required under the Code of Civil Procedure 1015.

THE COURT: Well, I'm going to continue at least a month, so it really doesn't make any difference. It will be outside, though, of what the notice is that you're entitled to under the Code. Okay. So we will deal with that part.

Now, I don't think there's any reason, unless you just enjoy being here.

(Mr. Smith and Mr. Polson leave the room).

THE COURT: All right. We're back on the record again. And now I would like to revisit the question that I asked earlier, Mr. Silverman, and that is: Is it your position that a new trial motion can be filed before we have a judgment?

MR. SILVERMAN: Yes. Referring to Code of Civil Procedure Section 659, Subdivision one, I'd be glad to read to the Court: "The party intending to move for a new trial must file with the clerk and serve upon each adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the Court or both, either before entry of judgment," or -- and Subdivision two deals with that.

THE COURT: All right. Now, I got what I will call a generic notice of intent to seek a new trial, which is permitted by that, apparently. And then I have a more detailed assertion as to what the grounds are, and I am receiving those documents into evidence. And as I understood it, you've intended to submit on the documentation at this point, at least initially; is that

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correct?

MR. HEISKALA: That's correct, your Honor.

THE COURT: All right. And Ms. Heiskala, I think I want to deal with that aspect of this first. And so I am also receiving into evidence your response to the new trial motion and your points and authorities. It had always been my understanding that -- exactly what Counsel said. And that is that you could file a motion for a new trial before or after judgment. And I have done that properly.

So I don't think there's a legal issue here. I think it's more a question of whether any of their stated grounds. They did withdraw the one about the jury verdict.

MR. HEISKALA: On a procedural note, I don't think there's any affidavits to support the portions of the motion to set aside that they're required to file. I didn't see anything. At least we didn't receive any affidavit with respect to the portion that would be covered by that.

But on the merits, I don't think there's any sufficient grounds on any of the points raised. Certainly, there was enough evidence before the Court to support the finding of $5000 per month income, or spousal support, I should say, for the Petitioner.

He has available to him income from a variety of sources, including the retirement accounts, and that income would go beyond the mandatory withdrawal that's required under the IRS. And also include accelerated withdrawals and the earnings on those accounts. That evidence was certainly presented at trial. His income from his practice, and other entities under his control.

So the evidence is more than sufficient. And I would submit to the Court that, whatever they submitted in questioning that, did not rise to any critical statement and no evidence to support their claim that there was no evidence.

The retirement accounts, he said that it was definitely traced. I think if anything happened in this case, it was nothing was definitely traced. I think your Honor's already noted that there was some -- a lot of confusion about debts claimed and where they came from and what entity. The notes referred to with respect to the Court's finding on Virginia Way, which is going to be adjusted, I think, with respect to value, they were not definitely traced to any account or any entity. Certainly not any specific retirement account. They were formed during the marriage. To the extent they were formed, they deserve to be treated as community proper.

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The Boyle Trust, there was absolutely no evidence supported -- provided that I can recall in that trial to support the characterization of separate property. So that there was absolutely no evidence to overcome the presumption of community property. It's actually the reverse of Mr. Shannahan would have the Court believe, that he had the evidence to support separate property. He did not.

Virginia Way doesn't consider the separate property portion he's claiming. The Court does not consider the separate property portion of Virginia Way. However, he waived his separate property claims on Virginia Way at the trial, number one, and, he appears to be willing to double count the debt against the property, as well as against the retirement account.

For all those reasons, the motion should be denied.

THE COURT: All right. And a reply to that response, please.

MR. SILVERMAN: Yes. Thank you. First of all, Mrs. Shannahan's objection to the procedural part is entirely unfounded. And she cites the Haferkamp case. That case involved a situation where there was no statement of decision. So under those circumstances, the motion for a new trial was premature. We don't have that here.

THE COURT: No. I think wasn't that an unlawful detainer case?

MR. SILVERMAN: It was. And, secondly, the objection with regard to the affidavit does not apply to Subdivisions five, six, or seven. And those are the bases on which the motion ultimately was made.

THE COURT: All right. Anything further?

MR. SILVERMAN: No. Thank you.

THE COURT: All right. On that, in the first place, I am finding that the motion for a new trial is procedurally correct. That is to say, it could be filed before the judgment was entered, number one; number two, I am denying the motion for a new trial.

I realize that this is typically in anticipation of an appeal, and it's a necessary step, or probably a desirable step in that direction. But that's where we stand on the new trial motion.

Now, I've got a 663 motion that is filed on behalf of Virginia Way LP that essentially objects to my order insofar as it affects them. And they are -- so to the extent they have a separate motion, I am receiving that into evidence. And I am denying that motion. So I'm denying both the CCP 663 motion which is the -- which specifically states an incorrect or erroneous

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legal basis for the decision, not consistent with or not supported by the facts under CCP 663 (1), as distinguished from a new generic new trial motion that I had on behalf of Mr. Shannahan.

And so that is also denied. Now --

MR. SILVERMAN: May I ask for clarification, and I will be entirely frank with the Court. I base this question on -- it's a personal question for me as counsel who has now heard the ruling. It is not something that was on my list to get the Court to say one way or the other. I am confused. Is the Court's ruling -- and let's just take Virginia Way -- that the residence is community property or that the limited partnership interest in Virginia Way LP is community property? And if I've opened up a whole can of worms, I apologize.

THE COURT: No. That's a legitimate question. What I am finding is that the property itself, the residence, the land it's on, is community property. And the fact that Mr. Shannahan has placed title to the property in a limited partnership, what I found was that was a breach of his fiduciary duty. That was not done with fully informed consent by the Petitioner.

And so I'm not saying that she owns the limited partnership as community property. I am saying that she

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owns the underlying asset held by that limited partnership. That may be a distinction without a difference, in some ways. But what I am saying is that if this was acquired during the marriage, it is presumptively community property. That presumption, in my view, was not overcome. And the fact that he has used various legal entities to own the property was not done in a way that it changed her community property interest in the underlying asset. That's the way I'm looking at this conceptually.

But it does present an interesting question. But I am saying that the asset itself, she owns one half of the equity in that property. And not through the limited partnership, but through her community property interest.

MR. HEISKALA: If I may on that point, your Honor. I think the confusion is the use of the word "own." Because Mr. Shannahan seemed to run with that word into federal court, saying -- quoting this decision that, you know, he owns Brookmeade. So I think the concept needs to be, and that's one of the clarifications we're asking for, is that community property rights override that ownership. Title may be claimed in another asset. He may claim that it's transferred to some other entity. But the bundle of

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rights of ownership, if you will, are subservient to the finding of community property.

THE COURT: Is that different from what I said, though?

MR. HEISKALA: Well, it seems to be understood differently. I think when you're using the word "ownership," he took that as -- that's the basis of his claim, that Brookmeade Partners owns the Brookmeade property.

THE COURT: But does have title to it.

MR. HEISKALA: But that's not what he's saying. Brookmeade Partners does not have title.

THE COURT: Okay. Well, that may be. I thought it did.

MR. HEISKALA: No. No. That's why I'm saying that. That wording -- I understand what the Court is saying. And I think it's -- you're saying that she has a -- or the community has an interest in that property. But the wording in the judgment that says something about owning -- and I'll find it for your Honor here. The title is in Northwest Financial.

THE COURT: That's right. But regardless of whether it's in Brookmeade Partners or in Northwest Financial, the point is it's not in the name of these parties.

MR. HEISKALA: Correct.

THE COURT: And it's not held in community property or joint tenancy that would be presumed to be community.

MR. HEISKALA: Correct.

THE COURT: And so I am saying that the underlying asset is community property.

MR. HEISKALA: Right.

THE COURT: And I don't know how to put that any clearer or differently. But Mr. Silverman was kind enough to ask me to clarify what I'm talking about. And I'm -- I'm trying to think of whether there's a way to be clearer about that. I am not saying that she owns in some way Brookmeade Partners or Northwest Financial. What I am saying is she owns the underlying asset as community property.

MR. HEISKALA: And that was what we were attempting to address in our supplemental.

THE COURT: And if that's unclear, the judgment should state that it's owned as community property, both of those. That was my intention. I thought I had said that. But I can see why -- and that the title did not somehow -- in other words, the change of entities that hold title to this property, which is changed from time to time, that doesn't change the community property

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nature of the ownership of the property.

MR. HEISKALA: Right.

THE COURT: And so however that needs to be worded.

MR. HEISKALA: I took a stab at it in my supplemental on page 4.

MR. SILVERMAN: To which we object. That was four day's notice. It is entirely new language. It is essentially challenging the statement of decision that has already been objected to and is final. There is no judgment that needs correcting. If there are hassles in dealing with the language of the judgment, we should cover those in due course. But proposing language in a pleading submitted four days before the hearing is not a motion to change a judgment.

MR. HEISKALA: On the timing --

THE COURT: That is correct. Although, I will say that the original motion to enter a judgment different than announced, and which in itself is somewhat questionable as far as the characterization of it. But the point is, I think I'm entitled to, before a judgment is entered, to have the judgment say what I want it to say. All right?

Now, I agree that the correct process is for judgment to be prepared. And before we leave this

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morning, I am going to direct that Ms. Heiskala prepare that within a specific period of time for your approval or for the approval of your side. And then to the extent there's an argument about it, I will resolve that.

But I thought as a preview of coming attractions, so to speak, I -- two things: Number one, I made a mistake as far as the gross value of Virginia Way, and it should be $1,550,000. That's number one.

Number two, it is correct -- and I thought that my statement of decision was clear on this, but I can see how it might not be, and it may have even spawned this federal case -- but my intention was that the underlying asset, these two properties, be community property. Not that she have an interest in the business entities that were set up by Mr. Shannahan. And that whole area is very confused because they have ownership interests in each other, and there are various problems with being involved in that.

But as far as I'm concerned as between these two parties, what he owes her is one half of the equity in the property. And I really -- and that is between these two parties. And that is the community property portion of it, as differentiated from these various entities that Mr. Shannahan set up, that I found that to the extent that he was intending, or they had the affect of divesting her of her community property interests, that that is a violation of his fiduciary duty; that he can't, under the guise of estate planning, without a very specific waiver from her which he did not have, effect that. Whereas so she no longer has a community interest in the underlying property. And to the extent -- let me jump ahead for just a moment.

How long do you need to prepare this judgment?

MR. HEISKALA: With the clarifications today, your Honor, I think probably 10 to 20 days. 10, 15 days, I guess.

MR. SILVERMAN: We'll be glad to take a stab at it in five and get it to Counsel.

THE COURT: Well, I'm going to compromise this. I want Ms. Heiskala's office as the Petitioner to prepare this. And at least based on what's happened so far, I think it's more likely to be in line with what I intended in my statement of decision than if Mr. Shannahan has to approve it and it comes from his side. I don't know that, but that's my concern.

And I'm going to limit that to 10 days. So today is the 6th. That would be the 15th -- would be the 16th, which I think is Friday, is it not, of next week? And so by noon on Friday of next week, I want the

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judgment prepared for the approval of Mr. Shannahan.

Within how many days would you want -- all I want is the proposed judgment and a writing with any objections to it. Not a different judgment so I have to prepare -- or compare them. What I want is the objections to the way they prepared them, and that could include additions as well as changes.

And then I will, from there, have the judgment prepared after considering that. Because I think if it's done any other way, we'll be here for a long time. And I want to get the judgment entered. And I'm willing to give up to 10 days if you would like that to respond.

MR. SILVERMAN: That would be fine, your Honor. Obviously if Mr. Morris gets it done sooner, he'll get it to you and Ms. Heiskala.

THE COURT: And if you'd simply approve it and send it to me for my signature. I recognize that there are likely to be objections for a number of reasons. That if you're protecting rights on appeal and for other reasons. I don't -- and I'm not asking approval as to substance or anything. I'm just talking about approval as to form on this. But, anyway, I do want to get it entered so the objections would be stated.

Now, I would like to -- and as far as I am concerned, those two changes can be made in your

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proposed judgment, along with whatever else you want to put in there. And they will object to them. And I'll decide which one or the other I want to sign.

Now, there's one other thing. You wanted an order for a judicial lien, in quotes, whatever that is, or in parentheses.

MR. HEISKALA: Yes.

THE COURT: And for the attorney's fees that I ordered of $150,000.

MR. HEISKALA: And for my client's share of the assets, because I have a rising concern about what's happening with these retirement accounts and --

MR. SILVERMAN: May I be heard, your Honor?

THE COURT: Please.

MR. SILVERMAN: Instead of --

MR. HEISKALA: Sorry. Just wrapping up his -- instead of any hint of compliance with what the Court's ordered, I think he's looking for any which way he can to not make it happen, so --

THE COURT: Let me -- I realize I'm jumping around a little bit. In terms of the proposed judgment, it was my intention that we continued with the same arrangement, other than the $3000 going to $5000 we had under the temporary other. And that included the fact that her right to occupy the Virginia Way residence

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while Mr. Shannahan was responsible for the lease payments on it would not be considered as deductible spousal support or as income to Ms. Shannahan. That part of it.

MR. HEISKALA: But it's part of her support.

THE COURT: Yes.

MR. SILVERMAN: May I be heard on that, as well?

THE COURT: Sure.

MR. SILVERMAN: Two points I'd like to make. The first is it's unclear to me whether the Court is making this award as permanent support or temporary support.

THE COURT: It's temporary.

MR. SILVERMAN: Okay. And then secondly, the substantive objection is that this -- if it is spousal support, then it should be deductible to him and income to her. Or then it is a distribution of property as far as equalization payment.

THE COURT: Well, as you probably know under the Tax Code, support can be deductible or nondeductible, and I'm making it nondeductible. And so that's -- I intend that she gets the benefit without having to pay taxes on it. And I believe that I have the power to do that.

And by the way, when I say it is temporary, that is a little bit misleading. It is intended to be part of the permanent support package. So I'd better reword that. There are a number of things going on here. But what I ordered was that under 4320, under the permanent support, that support would be at a particular level until she received her share of the assets, at which time it would reduce to zero. And so it is part of what I'll call loosely permanent support, which is a misnomer in itself. But trial support. And so that that -- I retract what I said about temporary support.

The other thing is, because it appears that there is likely to be an appeal here, it is intended also to be the support that would be in effect pending the outcome of the appeal. And I'm trying to avoid a separate motion on that. Because one of the things that may be appealed is the support. And so I need an order that is in effect pending the appeal.

And I -- and so but this is a part of the 4320 package. And so I would call it permanent support even though it's going to change automatically, if we ever get to the point that she has access to her funds under my division. And I -- so I don't -- it is not any longer, I guess, a temporary order.

MR. HEISKALA: It's almost a type of step down,

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I guess.

THE COURT: In a way. In a way. I just was anticipating -- normally I wouldn't have this kind of arrangement. In fact, I can't ever recall doing it before. But I just -- it did not seem to me that it was likely that Mr. Shannahan was going to write a check to Ms. Shannahan here or transfer over sufficient assets to satisfy what her -- what I found her interest in the community was.

And given the pace of other aspects of the case, she still needs to live, and so I made these orders. And I had a choice of keeping the temporary order in effect, the $3,000, and I elected not to do that and to increase that amount to $5000. Because he was continuing to have the use of all of these assets, as far as I can see, either directly or through the various entities.

So, anyway, it's permanent support, and I retract what I said earlier in thinking about it. I was thinking of temporary in the sense that it would change at some point, presumably. But it's still under Family Code Section 4320.

MR. SILVERMAN: I appreciate the explanation.

THE COURT: Now, what else?

MR. HEISKALA: The other was in our preliminary

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discussion, you touched on the issue with the reimbursement to the husband. We were objecting to his having additional time and presentation of evidence. And I think he found that --

THE COURT: Yeah. The only thing that I have received on Mr. Shannahan, in spite of all the time that we had to deal with this subject, at trial and thereafter, was a declaration from Mr. Shannahan in support of his claim for reimbursement. And he points out in his declaration -- it's a very short declaration consisting of two pages and signed April the 23rd of 2008 -- that I granted him reimbursement for the La Jolla Beach & Tennis Club, certain JAM's fees, the reporter's fees of $8500, and medical expenses.

And I wanted verification that they were paid from separate property and not community property. And he simply states that the -- he had certain sources of income and that all of the expenses, which were enumerated above, were paid from either salary or dividends which he received from his professional law corporation and so forth.

I am finding that that is not sufficient, does not meet the standard that I was asking for. He is required to show specifically what was paid and in what amount. And I'm not willing to give him additional time

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to do that. That's long past. So I'm not -- he is not entitled to any additional reimbursement plan.

Okay. What else do we have?

MR. SILVERMAN: We were in the middle of judicial liens.

THE COURT: Okay. Back to judicial liens. And I'll hear from you, Mr. Silverman, on that.

MR. SILVERMAN: Thank you. Very simply, Mr. Shannahan's position is that until an executable order, in this case a judgment, is entered, that there's no basis on which to issue whatever might be considered a judicial lien. And the statute cited by Mrs. Shannahan in her pleadings deals specifically with post-judgment.

THE COURT: I agree with that position, and so that's why I want to get the judgment entered. As a preview of coming attractions, I know I granted judicial lien at that time. I think I do need a judgment.

MR. HEISKALA: I would assume it could be put -- or was taking a position that it would be put as part of the judgment, that it would be issued within the language of the judgment, that judicial lien would. Just the same type of the contingency, basically, as the support. At such time as she receives her share of the assets, that she would have a judicial lien and I would

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also have a judicial lien.

Because part of their attack is that I don't have the right FLARPAL {phonetic} or lis pendens or any other protection. And as we've just discussed, the assets in which she has an interest are held in the -- in different titles. And I want to make sure that she is fully protected.

THE COURT: I think Mr. Silverman is correct, though, that it's a two-step process. The judgment has to be entered first. The other part of this, that I don't know what the effect is of the judgment being entered on a notice of appeal, does that prevent in some way a judgment lien because it's not a final judgment or a judicial lien? Or can I do it based on a judgment before it's final? I'm not sure. And that's why I'm reluctant to act on it all at once.

MR. SILVERMAN: I'm not sure either, your Honor. And I'm reluctant to even state a position, let alone give advice. I understand the Court's position. It's a logical one. And in the normal collection, I don't see that there would be a problem. But I'm not expressing that as a problem with obtaining a lien, despite the pending appeal. The judgment is enforceable upon entry, unless there's a stay. And taking an appeal from a judgment -- a payment of money is not stayed just by the filing of a notice of appeal.

THE COURT: That much is true. But isn't the next step potentially a bond or something, in which case the judicial lien wouldn't be there, but the bond would be, arguably? And so I'm not sure what's going to happen in that area. But that's why I think, though, it has to be a two-step process.

But if -- I mean, if we determine -- and I'm picking this number arbitrarily for a moment because of my lack of certainty about the Brookmeade equity. But let's assume that I determine that, overall, you're entitled to $3 million, all right, just to pick a number, Ms. Shannahan.

Normally we would have that bonded in, what, one and a half times? So that's a four and a half million dollar bond. If that is up, then I'm not concerned about a judicial lien. And that's why I'm saying I think it's a two-step process.

But maybe we get the judgment. If I think it's appropriate, there's a judicial lien. If they post a bond, then I would vacate the judicial lien in favor of the bond. Because I'd rather have the bond than -- I'm claiming the judicial lien is protection enough on appeal. Just assume stay away from that issue. And so that's why I want to do it.

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But I just wanted the parties to be aware. And I know Mr. Shannahan's not here personally. But that I want Ms. Shannahan to have protection in one form or another, whether it's a judicial lien, a bond or whatever it is. So that there's a source from -- presumably from which to collect her money, and we don't have a shell game where things are moving around again and nobody can get to anything.

I'm particularly worried about the lack of anything current involving the pension funds, which are an asset that I -- that seemingly can't be transferred into other names under the existing tax law. And so it's something that actually is there that I think I can deal with in this case, which is refreshing in itself for me.

And there seems to also be enough there, the last I knew, that it's adequate to satisfy the judgment as it presently stands. Although, if we continue with this, I'm beginning to wonder. So we do have that.

I intend to defer, just so we don't have to come back on this, these requests for fees, sanctions and so forth, because I think I'm going get a motion, number one, to defend an appeal, if there is one, and it appears there will be; and, number two, I would probably like to see the result of that appeal ultimately in deciding on that issue whether -- in other words, there's -- I have some problems with sanctioning or ordering 271-type fees.

Mr. Shannahan -- only to find out from the appellate court that Mr. Shannahan is right about certain things, that I'm wrong, and, therefore, he hasn't violated any fiduciary duties, just as an example. So that's why I'm reluctant to get into that.

But I want to keep that ability to do that there so that when we get all finished with this and the dust settles and we look at how much this has cost everybody, I can deal with it. And so but that to me is the time to do that. I want to distinguish that from the amount of money necessary to properly defend an appeal if it is filed by Mr. Shannahan. And what I'm about to say doesn't mean that I am right.

But I just want you to know, and I would appreciate this being conveyed to Mr. Shannahan. In my opinion, the most questionable part of my decision was my determination that the tracing was adequate insofar as these pension funds were concerned and the retirement funds. And which is something that I resolved in favor of Mr. Shannahan. And so I suspect if there's an appeal here, there may well be a cross-appeal. And we'll just find out who's more right about what I did.

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So I was hoping that we weren't going to go that route, because so much money had been spent on this litigation and so much time, that the idea of perhaps extending it another two years or whatever it might be involved, plus whatever affect the federal lawsuit has, just seemed like not a good situation.

And I don't think at the heart of my decision -- and this is not anything that's going into any order -- but I don't think at the heart of my decision, which is not that complicated, I basically said that some of the retirement funds are Mr. Shannahan's separate property because he brought them into the marriage, and some of it is community property, because they accumulated during the marriage, together with the appreciation on them; and that I felt that the two pieces of real estate acquired during marriage, Virginia Way and Brookmeade, were community property. That is all this judgment says. I realize we divided up Mammoth, and we dealt with some other issues. But at the core of this, that's all there is.

And then there is the support question. And in a long-term marriage, where I recognize that Mr. Shannahan at his age is entitled to retire and has largely wound down his practice, maybe. That's less than clear at times. And that as soon as you have an estate that is sufficient to provide for your reasonable support somewhat consistent with the marital standard of living, that in my view, there some not be a continuation of spousal support under the existing law.

And that much of this litigation was, in my opinion, unnecessary. And that it was appropriate for Mr. Shannahan to make some contribution toward your fees. And the final chapter in that book has not yet been written. Now, to me that is not a complicated decision. It is not something that needs a lot of discussion.

And to me, which is probably unimportant, but to me it seems fair, all right? Which is what I believe family law is ultimately all about. Although we have very strict rules to structure what is fair, I nonetheless think that is reasonable based on this marriage and the commitment that the two parties made to each other and all of the tragedy that has surrounded their children, particularly their son.

And for some reason, that doesn't seem to -- it doesn't seem possible to put this to rest and get on with something more constructive. And if the appellate court, as an example, believes that there are various errors here, and remands this back to someone else to try and we start all over again, I suppose that that's possible.

I think, speaking of tragedies, that that would be a tragedy. I don't mean the legal decision by the appellate court. I mean the effect on the parties. And to me that's the last thing we need. And I'm very disappointed and discouraged by the federal litigation and the idea that this case is going to potentially go on for an extended period of time. So that is not what I think is in anyone's interest. In fact, I know it isn't.

But, the beat goes on. And, now, I guess my question is: What else? The judicial lien, I would want to have the judgment entered before there's a request for judicial lien. And as I said, as a preview of coming attractions, I would probably grant that until we decide whether there is an appeal and whether it's bonded or not.

MR. HEISKALA: And your jurisdiction in this matter continues post-judgment to do that?

THE COURT: Yes.

MR. HEISKALA: Okay.

THE COURT: I do think, though, that beyond that, there is a question of whether my underlying appointment, once there's a judgment, ends. Not I believe I can make an enforcement order such as a judicial lien relating to the judgment; but at some point, I have to indicate that what it was agreed that I would handle as a privately compensated temporary judge is finished. And that normally ends with the judgment. And at that end, obviously if there's a reversal on this, it would be remanded.

What I'm not -- and normally that would be retried by a different judge, traditionally. Although, in my view, the appointing judge could decide that I would do that also, as an example, could refer it back. But I do think that I'm getting to the end of where I lose jurisdiction here.

But we've got to have a judgment entered. And I think the judicial lien question and also the decision on appealing and whether their fees are on appeal, I think that probably is also within my province, although that's open to some question.

MR. SILVERMAN: Please don't take my silence on either of those issues as a concession.

THE COURT: Yes. I'm not sure, either, Mr. Silverman. And it may be that I think I have to -- that someone else has to make those two decisions. And that I'm out of it at that point. I kind of -- or more importantly in some ways, that I shouldn't be the one making that decision.

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In other words, the appointing authority perhaps has to decide whether it extends to include those things under the wording of this. I'm not sure if I get to decide how much power I have, in other words, or whether that has to be back in the court system for those two things. That is to say, protection under the judgment and the fees on appeal, which I see are two things that are definitely coming up.

MR. HEISKALA: Right. Absolutely.

THE COURT: And I agree with you. I'm not sure where I stand on that. Generally speaking, we end it with the judgment. But generally speaking, we don't have sort of a known appeal hanging out there, which is -- makes it more questionable.

All right. Is there anything else?

MR. HEISKALA: Well, getting back to the putting together the judgment, we had discussed, both off and on the record, the concept of the community property and ownership and so on. And I had proffered some language to clarify that in the judgment. I don't know if your Honor's had an opportunity to look at that.

THE COURT: Well, I have. I have read all of this. But you can prepare the judgment with whatever language you want. And then it's either going to be objected to or not. And then I will make that decision.

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And I think that's the better way to do that.

MR. HEISKALA: And just for the record, I believe it was timely. It was a supplemental request. It's not a new request. It was supplemental to the first request, and it was served five days prior. I would correct our record that it wasn't a new order to show cause. That was an error that was filed that way. It was simply a supplemental request within the five days of the court hearing.

THE COURT: And I think as you know, whether something is supplemental or not depends on the magnitude of what's raised and how different it is and whether it causes surprise and whether there's a due process problem, from my standpoint.

And what they're raising is they're raising things that there wasn't adequate time to respond to. And it really expanded what was --

MR. SILVERMAN: That is Mr. Shannahan's position is that it's a new motion. It's new material. It was not supplemental. It was entirely new. The moving papers did not have those six or seven proposed paragraphs. Some dealing with issues not even mentioned in the moving papers. But the Court understands our position.

THE COURT: Yeah. And I agree with you.

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However, I agree with you in part. I still think they can prepare the judgment the way they want it, and you can object to it. And I will decide what I want to sign.

But what I wanted everyone to know in advance is that I did make a mistake on the gross value of Virginia Way. And because I had -- that number had the debt subtracted from it, and then it got subtracted again, which was not correct. And that was my error. And I do need to correct that.

As far as what language we need in the judgment clarifying this ownership issue and so forth, I'm going to -- I need to decide what language I think is appropriate, whether it's Ms. Heiskala's or whatever your side suggests, or if they do, and so forth. So we'll be looking at those in connection with the judgment. And I certainly agree we need to get a judgment entered.

MR. HEISKALA: Without belaboring that point, what triggered and brought that on was the statement in the declaratory relief action that was filed in the federal court. And I quote, paragraph 20 of that complaint states: "On October 29th, 2007, the San Diego Superior Court Family Law Division and Docket number -- issued a proposed statement of decision, holding that

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the Brookmeade property is, quote, 'currently owned by legal entities which were not joined in this action,' end of quote. Which finding was made after trial and before the December 15, 2007, fire laws." And it goes on.

So using that as a launching -- as I interpret it, figuring if it's not federal court, wherever else he's going to take that language and try to do something with it needs to be clarified in this judgment.

THE COURT: Yeah. And that may be careless wording, and it would have been better to say "titled" as distinguished from "owned by," given my determination of community property ownership.

MR. HEISKALA: And the fees and the -- or in the proposed final judgment, we were granted a $150,000 attorney's fees. That remains, and I'm hearing the Court also say that there would be more fees determined after the appellate process.

THE COURT: Well, as far as I'm concerned, from the point that I made the determination of $150,000 forward, is fair game for a request for additional fees at the end of this. I did not intend to revisit the breaches of fiduciary duty that occurred leading up to the judgment, unless I get some new direction from the appellate court.

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And what I mean by that is that in my view, there is sufficient acknowledgement of that if Ms. Shannahan gets her interests, her share of the judgment free and clear from all these problems with the titles and so on, and it is Mr. Shannahan that is left with all of that, that to me is enough of a consideration or a sanction for -- I'll say -- or damages for breach of fiduciary duty -- however you want to put it -- for the fact that he put all of these things in various titles and in trusts or legal and other legal entities that Ms. Shannahan had no significant interest in.

That if he's sort of left with that problem on his side, then as far as I'm concerned, that's been addressed. And he can address it into the future however way he wants. But that assumes that I can get Ms. Shannahan's share of the estate out to her clean, also. In other words, free of -- that it is a division that under the Tax Code is free of consequences to her; that it is in connection with the dissolution, and therefore exempt under the tax code, being taxed.

And I can now -- obviously, the form of these assets will have built into them certain problems so that if, as an example, we role these out into an IRA or we segregate them in some way, that there are no tax consequences at that point. But as we all know, as that money is taken out, there is tax to be paid on it. And that, of course, would be her responsibility at that point.

But what I don't want is her to have a tax consequence based on the division between the two of them, as distinguished from what she choses to do with her share of the assets when she has control of them. And, obviously, there aren't going to be penalties in taking them out, presumably. We have some age protection. But it is subject to income tax.

And at some point there will start to be mandatory withdrawal requirements from those funds, which I'm sure she's aware of.

MR. HEISKALA: So is the Court -- am I hearing the Court saying it's okay for him to satisfy, say, Brookmeade, for instance, one half of $4.1 million with the same dollars out of a retirement account? And then she pay the tax on it? Is that what I'm hearing? Because I think that's the way he's going to hear it.

THE COURT: Well, probably. Yes. Yes. In other words, what else is there within the estate?

MR. HEISKALA: I mean, there's no discount taken against the monies out of the IRA account. He's receiving dollars in a real property, and she's receiving dollars out of an IRA account that we know are taxable, but we don't know what the tax consequences are.

THE COURT: I have to look at -- I don't think I can get money out of Brookmeade very easily, owned by Northwest Financial -- and there's that word again, "titled" in Northwest Financial -- without presenting a whole litany of problems. And so to me, the most liquid funds we have or the most accessible by far are the pension funds.

MR. HEISKALA: I understand.

THE COURT: And I have no idea how Mr. Shannahan is going to untangle those other things, if he ever will. He probably would not in his lifetime. Probably just leave them the way they are, I would suspect. But I don't know that.

And, again, I see so many things that could be done through a cooperative effort here, that are not being done, to make an intelligent division of this that would be beneficial to both of them. But given that I don't have that level of cooperation and that everything seems to have to be litigated and decided through the adversary process, what I'm going to do is take the most accessible liquid funds that I have control of and satisfy the judgment from that.

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Now, I realize that some taxes will be paid down the line as that's taken out. But it seems to me that Mr. Shannahan has a lot bigger problems than that with the form of the remaining assets. I mean, how they're titled, and also getting any actual money out of them without paying taxes. He's done a very good job of deferring things. But he hasn't avoided them --

MR. HEISKALA: Oh, no.

THE COURT: -- by any means. And but if he continues to be one step ahead of the IRS, he can certainly -- he's shown a great skill for continuing to defer them. And that's fine. I think he enjoys that, actually. It's an intellectual challenge to him. We had some accountants that it was an intellectual challenge to them. It became a problem of ours, eventually, because the IRS decided eventually they weren't going to -- they didn't care what the rules had been. They were different now, and that was too bad. So, you know, sometimes I think you can outsmart yourself a little bit.

But, anyway, you're correct in stating that I -- I alluded to that, I believe, in my statement of decision. I think that is -- I would prefer that those funds be divided more evenly and that she get Virginia Way, as an example, because I think that's a more

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intelligent way of doing it. But that can only be done with everybody's cooperation, I think.

And if we're not doing that, then we're going to do it all through retirement. And it is true, I realize in most cases, you would certainly rather have cash in the bank than outside a retirement plan than a retirement plan. But I would rather have retirement funds than this real estate that is held -- that is titled in all these different names with the interlocking debts between them, or interrelated debts. I wouldn't much want to have that set of assets, personally.

MR. HEISKALA: I understand that part. And, then, there's just one final. I understand also your anticipation of the request for fees on appeal, which absolutely there would be. But, meanwhile, there's this federal litigation that she's been named in as a defendant. And she's not been served yet, I don't believe.

MS. SHANNAHAN: No, I haven't.

MR. HEISKALA: We'll have to have representation, I'm assuming, if it continues to go forward. And I would ask for fees for that action. I don't intend to do anything with it. But she's going to have to have somebody for that.

THE COURT: Well, I'm not going to make an order like that at this point. But it is true that under the Family Code of related action, there is the power in whoever the judge is to make that kind of an order, if they so choose. And I think that's the risk that Mr. Shannahan runs with proliferating the litigation with appeals and with federal actions and so forth.

It's an interesting question that I haven't seen an example of, but there may be one, where the collateral litigation is outside of the state courts and is in a federal court. If that makes any difference. Because the ones I've seen generally are state court actions, and they have allowed fees to be ordered.

There's also some question: Do you have to incur the fees and then come into the family court action and say I want to get this back now, or can it be like a 20 -- Family Code Section 2030 award that anticipates the ability to litigate into the future? And I'm not sure what the answer to that is, as an example. So I have some concerns about that.

But, ultimately, I think the Court does have the power probably to order fees in the collateral litigation, in some stage, anyway.

MR. SILVERMAN: But that's not before the Court today.

THE COURT: Oh, no, it's not. But you can see it coming on the horizon here. And the Family Code Section 2030 deals with the fact that the Court has the power to order fees on appeal, as you know. But these collateral actions is authority for those kinds of fees, also. So it can be defended. And this is certainly an interrelated action that falls into that category, I would think.

But I'm not sure what the appropriate time to do that is. I don't know whether that has to be done by when it's over or if it can be done along the way to have funds to defend it. I don't know if it has to be brought by the new attorney. And I certainly can't prejudge whether it would be granted. So those are all interesting questions, but not before us today.

MR. HEISKALA: Well, I did file for fees and --

THE COURT: I know.

MR. HEISKALA: And I outlined she had these various fees, including Bill Sullivan, over the insurance issue.

THE COURT: I just think, Ms. Heiskala, that when she hasn't been served in the action and we don't even know who'll be representing her, it wouldn't surprise me if this went anything in the range of being summarily dismissed to being taken pretty seriously and involve a lot of legal work. And it would be really hard to anticipate at this stage what is a reasonable fee for that until we know how the federal court intends to proceed. Sometimes they simply will not get involved in family law.

I also do not know, when this judgment clarifies the ownership question, if that is the building block on which he filed this. And it may be that it crumbles on that basis. I'm not sure about any of these. But we're just discussing hypothetically, here, right now, and that is -- that can always get me in trouble. So maybe we'll stop the hypothetical discussion.

Is there anything more that needs to be dealt with here?

MR. SILVERMAN: Nothing from the Respondent.

THE COURT: And let's see, then, if Ms. Heiskala can come up with something.

MR. HUBER: I think we've covered it, your Honor.

MR. SILVERMAN: Actually, if the Court give me just one second. I did come in with a list.

THE COURT: Okay.

MR. HEISKALA: And I don't want to put you on

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the spot. But I do need your -- I'm not sure I had it clarified in the beginning as to what your role is and -- because the letter says special appearance.

MR. SILVERMAN: You do not have to serve me with anything. I'm here on behalf of John Morris and Darvy Mack Cohan. You are welcome to just continue however you were dealing with both of those gentlemen. And I will make sure -- you are welcome to deal with them directly as if they were here. And I will make sure that each of them gets a full report. And, actually, I will be talking to Mr. Shannahan, also, in their absence, because I was asked to call him this afternoon.

THE COURT: All right. Thank you.

MR. SILVERMAN: That's everything on behalf of Respondent. Thank you, your Honor.

MR. HEISKALA: Thank you.

THE COURT: Thank you all, then, for your courtesy here. And that concludes our proceedings today.

(The proceeding was concluded at 12:10 p.m.)

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